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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 JAIME J. PERDOMO,

12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN, Commissioner  
15 of the Social Security  
Administration,

16 Defendant.  
17

Case No. EDCV 14-0066 ODW (SS)

18 **MEMORANDUM DECISION AND ORDER**

19 **I.**

20 **INTRODUCTION**

21  
22 On January 23, 2014, Jaime J. Perdomo ("Plaintiff"),  
23 proceeding pro se, filed this action seeking to overturn the  
24 decision of the Commissioner of the Social Security  
25 Administration ("Defendant") denying his application for  
26 disability benefits. Plaintiff has not consented to the  
27 jurisdiction of the Magistrate Judge assigned to this action.

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1 On February 12, 2014, the Court issued an Order Regarding  
2 Further Proceedings, (Dkt. No.8), which required Plaintiff to  
3 serve the Complaint and file a Proof of Service within 30 days,  
4 i.e., by March 14, 2014. On April 4, 2014, the Court issued an  
5 Order To Show Cause Why This Action Should Not Be Dismissed For  
6 Failure To Prosecute ("OSC"). (Dkt. No. 9). The OSC directed  
7 Plaintiff to file a Proof of Service or explain in a declaration  
8 "establishing good cause as to why Plaintiff has been unable to  
9 file a proof of service" by April 18, 2014. (Id. at 1).

10  
11 As of the date of this Order, Plaintiff has not yet filed a  
12 Proof of Service or responded to the Court's April 4, 2014 Order  
13 to Show Cause. Further action cannot be taken in this matter  
14 without Plaintiff's participation. The Court therefore finds  
15 that dismissal of this action with prejudice is appropriate  
16 pursuant to Federal Rule of Civil Procedure 41(b) for failure to  
17 prosecute and comply with Court orders.

## 18 19 II.

### 20 DISCUSSION

21  
22 Federal Rule of Civil Procedure 41(b) grants district courts  
23 the authority to sua sponte dismiss actions for failure to  
24 prosecute or to comply with court orders. See Link v. Wabash  
25 R.R., 370 U.S. 626, 629-30 (1962) ("The power to invoke this  
26 sanction is necessary in order to prevent undue delays in the  
27 disposition of pending cases and to avoid congestion in the  
28 calendars of the District Courts."). Dismissal, however, is a

1 harsh penalty and is to be imposed only in extreme circumstances.  
2 See Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986). In  
3 considering whether to dismiss an action for failure to prosecute  
4 or to comply with a court order, the Court must weigh five  
5 factors: "(1) the public's interest in expeditious resolution of  
6 litigation; (2) the court's need to manage its docket; (3) the  
7 risk of prejudice to defendants/respondents; (4) the availability  
8 of less drastic alternatives; and (5) the public policy favoring  
9 disposition of cases on their merits." Pagtalunan v. Galaza, 291  
10 F.3d 639, 642 (9th Cir. 2002); see also Oliva v. Sullivan, 958  
11 F.2d 272, 274 (9th Cir. 1992) (applying the factors in reviewing  
12 the dismissal of a social security case).

13  
14 **A. The Five Factors Support Dismissal**

15  
16 **1. Expeditious Resolution And The Court's Need To Manage**  
17 **Its Docket**

18  
19 In this instant action, the first two factors - the public's  
20 interest in expeditious resolution of litigation and the Court's  
21 need to manage its docket - weigh in favor of dismissal.  
22 Plaintiff was originally required to file a Proof of Service in  
23 this action by March 14, 2014. After Plaintiff failed to meet  
24 this deadline, the Court issued an OSC granting Petitioner until  
25 April 18, 2014 to file a Proof of Service or explain why he was  
26 unable to do so. (Dkt. No. 9 at 1). The Court expressly advised  
27 Plaintiff that "failure to timely file a proof of service or a  
28 declaration in response to th[e] [OSC] w[ould] result in a

1 recommendation that this action be dismissed with prejudice for  
2 failure to prosecute, pursuant to Federal Rule of Civil Procedure  
3 41(b)." (Id.).

4  
5 As of the date of this Order, however, Plaintiff has not  
6 filed a Proof of Service or responded to the OSC. Plaintiff's  
7 dilatory conduct hinders the Court's ability to move this case  
8 toward disposition and indicates that Plaintiff no longer intends  
9 to move this case forward or litigate this action diligently.  
10 Accordingly, the first two factors militate in favor of  
11 dismissal.

## 12 13 **2. The Risk Of Prejudice To Defendant**

14  
15 The third factor, prejudice to Defendant, also favors  
16 dismissal. "Unreasonable delay is the foundation upon which a  
17 court may presume prejudice." Southwest Marine Inc. V. Danzig,  
18 217 F.3d 1128, 1138 (9th Cir. 2000); see also Pagtalunan, 291  
19 F.3d at 643 (unnecessary delay caused by plaintiff's inaction  
20 "inherently increases the risk that witnesses' memories will fade  
21 and evidence will become stale"). The risk of prejudice to a  
22 defendant is related to the plaintiff's reason for failure to  
23 prosecute an action. See id. at 642 (citing Yourish v.  
24 California Amplifier, 191 F.3d 983, 991 (9th Cir. 1999)).

25  
26 Here, Plaintiff has not offered any excuse for his failure  
27 to respond to the Court's order. Where a party offers a poor  
28 excuse for failing to comply with a court's order, the prejudice

1 to the opposing party is sufficient to favor dismissal. See  
2 Yourish, 191 F.3d at 991-92. Because Plaintiff has not offered  
3 any excuse for failing to respond to the Court's order, the  
4 "prejudice" element favors dismissal.

### 5 6 **3. Less Drastic Alternatives**

7  
8 The fourth factor - the availability of less drastic  
9 sanctions - ordinarily counsels against dismissal. However, the  
10 Court has attempted to avoid outright dismissal of this case by  
11 extending Plaintiff's deadline for filing a Proof of Service from  
12 March 14, 2014 to April 18, 2014. (Dkt. No. 9 at 1). The Court  
13 also afforded Plaintiff the opportunity to explain why he failed  
14 to file a Proof of Service by March 14, 2014 and to set forth any  
15 reason why he could not comply with the Court's deadlines.  
16 (Id.). In the OSC, the Court expressly advised Petitioner that  
17 "failure to timely file a proof of service or a declaration in  
18 response to th[e] [OSC] [would] result in a recommendation that  
19 this action be dismissed with prejudice for failure to prosecute,  
20 pursuant to Federal Rule of Civil Procedure 41(b)." (Id.).  
21 Accordingly, the Court has taken meaningful steps to explore  
22 alternatives to dismissal here. See Henderson, 779 F.2d at 1424  
23 ("The district court need not exhaust every sanction short of  
24 dismissal before finally dismissing a case, but must explore  
25 possible and meaningful alternatives."). Given Plaintiff's  
26 demonstrated unwillingness to participate in his own litigation,  
27 sanctions other than dismissal do not appear to be appropriate at  
28 this time.

1           **4.     Public Policy Favoring Disposition On The Merits**

2  
3           The fifth factor - public policy favoring disposition of  
4 cases on their merits - also ordinarily weighs against dismissal.  
5 Notwithstanding this policy, it is the responsibility of the  
6 moving party to move toward that disposition at a reasonable pace  
7 and to refrain from dilatory and evasive tactics. See Morris v.  
8 Morgan Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991). Here,  
9 Plaintiff has not discharged this responsibility despite having  
10 ample time do so. Under these circumstances, the public policy  
11 favoring resolution of disputes on the merits does not outweigh  
12 Plaintiff's failure to timely respond to Court orders.

13  
14       **B.     Dismissal Of This Action Is Warranted**

15  
16           In view of the foregoing, the Court concludes that dismissal  
17 of this action is warranted under Rule 41(b), which states in  
18 pertinent part:

19  
20           [A] dismissal under this subdivision (b) and any  
21 dismissal not under this rule -- except one for lack of  
22 jurisdiction, improper venue, or failure to join a  
23 party under Rule 19 -- operates as an adjudication on  
24 the merits.

25  
26 Fed. R. Civ. P. 41(b).

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1 Dismissal of this action is proper on the basis of  
2 Plaintiff's failure to prosecute and obey Court orders.  
3 Accordingly, this case does not fall into one of the three  
4 exceptions noted above and, consequently, the dismissal will  
5 operate as an adjudication on the merits. The dismissal will  
6 thus be with prejudice to Plaintiff's refiling of a new action in  
7 federal court based on the same allegations. See Stewart v. U.S.  
8 Bancorp, 297 F.3d 953, 956 (9th Cir. 2002) (dismissal interpreted  
9 as an adjudication on the merits unless one of the Rule 41(b)  
10 exceptions applies); Owens v. Kaiser Found. Health Plan, Inc.,  
11 244 F.3d 708, 714 (9th Cir. 2001) (dismissal for failure to  
12 prosecute is treated as an adjudication on the merits) (citing  
13 United States v. Schimmels (In re Schimmels), 127 F.3d 875, 884  
14 (9th Cir. 1997)).

15  
16 The Court advised Plaintiff in the OSC regarding the  
17 possibility of dismissal of this action in the event of a failure  
18 to file a Proof of Service or other response. Despite this  
19 warning, Plaintiff has failed to comply with the Court's orders  
20 and participate in his own litigation. Accordingly, the Court  
21 concludes that dismissal of this action pursuant to Federal Rule  
22 of Civil Procedure 41(b) is proper.

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III.

CONCLUSION

For the foregoing reasons, this action is DISMISSED with prejudice for failure to prosecute and obey court orders.

DATED: August 14, 2014



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OTIS D. WRIGHT, II  
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

/S/  
\_\_\_\_\_  
SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE

THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS, WESTLAW,  
OR OTHER LEGAL DATABASE